SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION)

1949

Volume I

Part 9

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PROCTOR MRUBATA & ANO. *v.* ALTON DONDOLO.

KINGWILLIAMSTOWN: 18th November, 1949. Before J. W. Sleigh, Esq., President. Pike and Van Heerden, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction and Pregnancy—Practise and Pocedure—Illegitimate child of widow of christian marriage born at her brother's kraal—Brother no title to sue for damages under native law unless widow was rejected by her husband's relatives—Failure to putuma *widow and her children does not justify inference that she was rejected—Rights to illegitimate child of spinster and widow governed by different principles.*

Appeal from the Court of the Native Commissioner, Whittlesea.

Sleigh (President), delivering the judgment of the Court.

Plaintiff sued defendants for five head of cattle or their value, £25, as damages for the seduction and pregnancy of Esther Mpateni. First defendant is charged with the seduction and second defendant is sued in his capacity as kraalhead.

In the particulars of claim plaintiff alleges that he is the only brother of Esther's widowed mother and claims to be the girl's guardian according to native law.

In a special plea defendants deny that plaintiff is the guardian of Esther and contest his right to institute the action. They also deny that first defendant had seduced Esther and caused her pregnancy.

It is not disputed that Esther's mother, Elizabeth, married Edward Mpateni according to christian rites on 3rd April, 1906, and paid 10 head of cattle as dowry. There were no children of the marriage. Edward was killed in the Bullhoek Rebellion in May, 1921, and about two years later Elizabeth left her husband's kraal and returned to her own people's kraal where she had three illegitimate children namely, Esther, Rebecca and Mirriam.

The Native Commissioner found that Elizabeth was repudiated by Edward's brothers and ejected from his kraal. In other words he held that the customary relationship which existed between Elizabeth and Edward's family after his death had been terminated by the ejectment, that Edward's relatives consequently forfeited all rights to fines and dowries payable in respect of her illegitimate children and that plaintiff is therefore their guardian according to native custom. He entered judgment for plaintiff as prayed with costs. This judgment is attached on appeal on the grounds—

(1) that it is against the weight of evidence; and

(2) that plaintiff is not the lawful guardian of Esther Mpateni and has no title to sue.

The action was brought under native law and must be tried under that system of law because plaintiff would have no right to sue under common law. Now, in the circumstances disclosed, plaintiff would be the guardian of Esther and entitled to recover damages for her seduction if the parties are Pondos [Mfana *v.* Ntlokwana, 1945, N.A.C. (C. & O.) 69]. There is nothing in the record to show to what tribe the parties belong, but it is improbable that they are Pondos since they reside in a location inhabited by Fingos and Tembus.

Plaintiff would also be entitled to sue if it is established that Edward's male relatives had repudiated his widow and had driven her from her late husband's kraal where she had a right to live and to be maintained [Desemele *v.* Sinyako, 1944, N.A.C. (C. & O.) at p. 19].

The only admissible evidence of repudiation on plaintiff's side is that of Elizabeth herself. She says: "I stayed 2 years at my

husband's kraal after his death. I was not at all happy. My husband's father maintained me but he did not look after me well. I went to work in Queenstown because I was not properly supported at home. I left the kraal because of the way I was being treated by Joseph Mpateni, my husband's younger brother and because they were selling my stock. My hut was also burnt down. That was an indication that they were driving me away and they also said that to me. They treated me badly because there was a big estate and I had no children". Under cross-examination she says:—

"The trouble between myself and my husband's family, i.e. Jibile and Peter Mpateni, his brothers, started just after his death. Jibile and Peter were at Cala but Jibile came to see his wife who also stayed with me. I did not take any property away with me when I left my husband's kraal as it was burnt in the hut. I did not take any official action to get my property back".

It is thus clear that her main reason for leaving Edward's kraal is that she was not properly supported and that she was compelled to take up employment in order to support herself. If the estate stock were being disposed of unlawfully, she would have taken some action to prevent it. She admits that she took none. And, if Jibile had driven her away, she would have followed custom and reported to the headman. She did not do this.

She does not describe the circumstances in which her hut was burnt, but Roselina Matshoba, who was called by the defence but who appears to be quite impartial says:—

"Elizabeth left because her hut was burnt. I saw it burning from a distance . . . Jibile was occupying the other hut at Edward's kraal. Elizabeth left Edward's kraal shortly after the hut-burning. Elizabeth left because her hut was burnt and she feared to stay. Elizabeth feared that Jibile and his wife would also endanger her. I do not know who burnt Elizabeth's hut. Suspicion was on Jibile's wife. Elizabeth and Jibile quarrelled over who burnt the hut. The trouble only started after the hut-burning."

The evidence that Elizabeth feared for her safety must be pure surmise because she herself does not say that she was afraid to stay. At any rate there is no clear evidence that the hut was burnt intentionally. It is true that suspicion fell on Jibile's wife, but if there were good grounds for the suspicion the matter would have been reported to the Police or the headman.

We can find no evidence to justify the conclusion that she was driven away. On the contrary, the evidence goes to show that she left because she was not adequately supported and because, after the burning of her hut, she had no place to live in. The facts that she did not complain to the authorities and took no steps to recover her share of the joint estate support the view that she left voluntarily.

It is contended that the failure of her husband's relatives to *putuma* her or claim the dowry paid for her and the children supports the view that she had been discarded or repudiated. The contention might have carried some weight if Elizabeth was a wife, and not a widow, but the relatives of a deceased husband have no right to demand the return of his widow or restoration of her dowry (Nbono *v.* Manoxowini V1 E. D.C. 62); and where an illegitimate girl is born to a widow at the kraal of her maternal grandfather it is not unusual to leave her there until she marries before any claim is made in regard to her or her dowry. [Matinise *v.* Malote 1936 N.A.C. (C. & O.) at p. 124]. Failure on the part of her husband's people to claim the girls or the fine for Esther's seduction does not therefore justify the inference that they recognised plaintiff's claim.

In our opinion plaintiff has failed to prove that Elizabeth was rejected by her husband's relatives and consequently he cannot claim to be the guardian of Esther on the ground that her mother was repudiated.

Our attention has been drawn to the decision in Magcoba *v.* Magcoba (6 N.A.C. 17) where it was held that a civil marriage is absolutely and completely dissolved by the death of one of the spouses and that the immediate effect of such dissolution is to put an end to all the legal consequences of the marriage. It is contended that as the death of Edward dissolved the marriage, Elizabeth reverted to the status of an unmarried woman and consequently her illegitimate children born after her husband's death belong, in native law, to her father or his heir. This contention is not well-founded. A widow is of course an unmarried woman, but she is not a spinster, and the principles which govern the rights to an illegitimate child of a spinster and of a widow respectively are entirely different. The general rule among most tribes is that the illegitimate child of a spinster —if no fine has been paid—belongs to its maternal grandfather, whereas a widow, whose dowry has not been returned, bears children for her deceased husband. Plaintiff cannot therefore claim guardianship under native law over the illegitimate children of his widowed sister.

In *Magcoba*'s case (*supra*) the Court held that the illegitimate son born of a widow of a christian marriage cannot inherit the estate of her deceased husband. The reason for this decision was that the Court was not prepared to recognize a custom which encouraged "the widow of a christian marriage, for the sake of bearing an heir to her deceased husband, to indulge in illicit intercourse under circumstances repugnant to the moral principles of christian marriage and which would perpetuate in certain respects the consequences of a contract which has been absolutely and completely dissolved by her husband's death." It is thus clear that the decision was based entirely on moral grounds. It may, or may not, be possible to support the judgment on strictly legal grounds, but one thing is certain that, if the husband in that case had left a legitimate son and the illegitimate child of the widow was a girl, the Court would not, and could not, have invoked moral principles as a ground for depriving the son and heir of the dowry paid for the girl, and it would have made no difference whether or not the girl was born at the kraal of the deceased husband. Be that as it may, we are not now asked to decide who is the proper person to institute the action. We are asked to say that plaintiff is the legal guardian of Esther according to native law. As we have pointed out he is not nor is he the guardian under common law. He has therefore no title to sue. The special plea should therefore have been upheld. As the appeal succeeds on this ground it is unwise at this stage to give a decision on the question of seduction.

The appeal is allowed with costs and the judgment of the Court below is altered to read: "The special plea is upheld and the summons is dismissed with costs."

For Appellant: Mr. Stanford.

For Respondent: Mr. Gillett.

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